A **KERAJAAN MALAYSIA v. GOLDEN CITRUS SDN BHD & ORS**

HIGH COURT MALAYA, PULAU PINANG
KENNETH ST JAMES JC
[ORIGINATING SUMMONS NO: PA-21NCVC-38-11-2020]
13 JULY 2022

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Abstract – *The tax payable becomes due and payable as soon as the notice of assessment is served on the party assessed pursuant to the Income Tax Act 1967, irrespective of whether the party appeals against the assessment. The Inland Revenue Board is statutorily entitled to recover the sum assessed by way of civil proceedings as a debt due to the Government. The application by the party assessed to stay the civil proceeding for the recovery of the amount assessed ought not to be allowed unless 'rare and compelling circumstances' are established.*

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REVENUE LAW: *Income tax – Additional assessment – Appeal by company to Special Commissioners of Income Tax ('SCIT') – Inland Revenue Board ('Revenue') filed civil suit pending appeal – Company sought stay of proceedings pending outcome of appeal to SCIT – Whether there was 'rare and compelling circumstances' to stay proceedings – Whether proceeding could be held back pending outcome of another proceeding – Whether Revenue statutorily entitled to file separate civil claim for tax payable as debt due – Whether company obligated to pay assessed tax irrespective of appeal against assessment – Income Tax Act 1967, ss. 103(1) & 106(3)*

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CIVIL PROCEDURE: *Stay – Stay of proceedings – Appeal against additional assessment by company – Inland Revenue Board filed civil suit pending appeal – Company sought stay of proceedings pending outcome of appeal to Special Commissioners of Income Tax – Whether there was 'rare and compelling circumstances' to stay proceedings – Whether proceeding could be held back pending outcome of another proceeding – Whether suit could be determined on current law and legal principles*

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The plaintiff ('LHDN'), for the year of assessment 2015, imposed on the company an additional tax of RM3,125,969.67, the notice of which was issued in October 2016. The company thus lodged an appeal against the additional assessment to the Special Commissioners of Income Tax ('SCIT'). While the appeal was pending disposal, LHDN filed this suit under the Income Tax Act 1967 ('ITA') to recover the amount of tax. The defendants thus filed an application to stay the suit pending the hearing and ultimate disposal of their appeal to the SCIT. The defendants contended that there were 'special circumstances' that justified the stay, in that: (i) the civil suit was for the same amount of tax that the defendants were appealing against before the SCIT; and (ii) that the appeal by the former Prime Minister, Datuk Sri Mohd Najib Abdul Razak ('DSN'), which was pending before the Federal Court had a bearing on the application for the stay.

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Held (dismissing defendants' application for stay of proceedings):

(1) Section 103(1) of the ITA obligates the company to pay the assessed tax payable for any year of assessment, whether or not the company appeals against the assessment, whilst s. 106(3) provides that the LHDN could recover any tax due and payable, as a debt, by filing a civil suit for the amount. Hence, when the assessment notice was issued to the defendants, the defendants were under a statutory duty to pay the amount of tax assessed. This duty is sustained even if the defendants challenged the assessment by an appeal to the SCIT. The civil suit was independent and distinct from the defendants' appeal to the SCIT and the LHDN was statutorily entitled to file this separate civil claim for the tax payable as a debt due to the LHDN. (paras 4, 6, 26 & 45)

(2) One proceeding should not be held back by another proceeding. There must be 'special circumstances' before a stay of execution could be granted. However, the defendants were seeking to stay the civil suit pending the outcome of another proceeding on the ground that the other proceeding would have a bearing on the present suit. Hence, there must be a 'rare and compelling circumstances' before a stay could be granted. The appeal by DSN to the Federal Court did not tantamount to a rare and compelling circumstance that warranted a stay of this civil suit proceeding. This civil suit could and should be determined on the current existing law and on current legal principles. There was nothing rare and compelling in the circumstances, as the civil suit proceeding has its own process leading to its determination. (paras 16, 30, 31, 40, 41 & 46)

(3) There would not be an overpayment of tax because, at the end of the day, there is an accounting or a netting-off calculation that had to be done on the tax amount payable. Hence, if the defendants succeed in their appeal to the SCIT, the assessed tax amount would be extinguished or reduced. It would follow that the amount of tax already paid to the LHDN, over and above the assessed tax amount, would be refunded as an overpayment. (paras 33 & 38)

Case(s) referred to:

Chong Woo Yit v. Government Of Malaysia [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9 SC ***(refd)***

Jacob and Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co.kg & Ors [2013] 1 LNS 914 HC ***(refd)***

Kerajaan Malaysia v. Mudek Sdn Bhd [2017] 10 CLJ 158 FC ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 4 CLJ 1 FC ***(refd)***

Protasco Bhd v. Tey Por Yee & Another Appeal [2018] 5 CLJ 299 CA ***(refd)***

Reichhold Norway ASA & Anor v. Goldman Sachs International [2000] 1 WLR 173 ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***

Legislation referred to:
Income Tax Act 1967, ss. 103(1), 106(1), (3)
Rules of Court 2012, O. 34

For the plaintiff - Nurul Nazmin Roslan; Lembaga Hasil Dalam Negeri
For the defendants - Tinoshiny Arumugam; M/s Athimulan & Co

Reported by S Barathi

JUDGMENT
(Defendants' Application For A Stay Of Proceedings)

Kenneth St James JC:

Prelusion

[1] This is a tax case. The plaintiff (LHDN) assessed an additional tax amount on the first defendant (company) for 2015. The company lodged an appeal against this additional assessment to the Special Commissioners of Income Tax. The LHDN then took this civil suit against the company, and against the company's directors: the second and third defendants. In response, the defendants filed an application to stay this civil suit, pending the "hearing and ultimate disposal" of their appeal with the Special Commissioners. Should this suit and its proceedings be stayed pending the outcome of the appeal before the Special Commissioners?

The Applicable Facts

[2] For the assessment year 2015, the LHDN imposed on the company an additional tax payable of RM3,125,969.67. The LHDN issued to the company a notice of assessment for the additional tax in October 2016. In November 2016, the company filed the appeal against this assessment. The appeal is now pending before the Special Commissioners.

[3] While the Appeal is awaiting disposal, the LHDN filed this civil suit under the Income Tax Act 1967 (the Act).

The Relevant Provisions Of The Act

[4] The relevant provisions of the Act that apply to this proceeding include sub-s. 103(1). Sub-section 103(1) obligates the company to pay the assessed tax payable for any year of assessment, whether or not the company appeals against the assessment.

[5] Sub-section 103(1) is set out here:

> **Section 103. Payment of tax.**
>
> (1) Except as provided in subsection (2), tax payable under an assessment for a year of assessment **shall be due and payable** on the due date **whether or not that person appeals** against the assessment.
>
> (emphasis added)

[6] Another relevant provision of the Act is sub-s. 106(1). Subsection 106(1) provides that the LHDN can recover any tax due and payable, as a debt, by filing a civil suit for the amount.

[7] Sub-section 106(1):

> **Section 106. Recovery by suit.**
>
> (1) Tax due and payable may be recovered by the Government **by civil proceedings** as a **debt due** to the Government. (emphasis added)

[8] Also relevant for analysis here is sub-s. 106(3). Sub-section 106(3) is the ouster clause that says that in any civil suit filed under s. 106, the court cannot consider the argument that the amount of tax that the LHDN seeks is excessive, incorrectly assessed, is under appeal or is incorrectly increased.

[9] This is sub-s. 106(3):

> **Section 106. Recovery by suit.**
>
> (3) In any proceedings under this section **the court shall not entertain** any plea that the amount of tax sought to be recovered is **excessive, incorrectly assessed, under appeal** or **incorrectly increased** under subsection 103(3), (5) or (7). (emphasis added)

The Defendants' Reasons For A Stay Of Proceedings

[10] The defendants have two grounds for a stay of this civil suit proceedings. First, the defendants argue that this civil suit is for the same amount of tax that the defendant is appealing against before the Special Commissioners. So, the defendants say that a judgment in this civil suit should wait for the outcome of the decision of the Special Commissioners. The defendants submit that this circumstance constitutes a "special circumstance" that warrants a "stay of proceeding".

[11] Second, the defendants argue that Mohd Najib bin Abdul Razak (the former Prime Minister) has an appeal that is pending before the Federal Court that has a bearing on this application for a stay of proceeding. One of the issues that the Federal Court will decide on, that will affect this application for stay, is: Whether sub-s. 106(3) is "unconstitutional and/or *ultra vires*", as it "usurps the judicial power" of the courts.

[12] The defendants say that this pending Federal Court hearing and decision constitutes a "special circumstance" that justifies a stay of this civil suit proceeding.

The Law On Stay Of Proceedings: Rare And Compelling Circumstances

[13] I noticed that both the defendants and the LHDN are arguing about the law on stays of execution – that a stay of execution will only be given if there are "special circumstances" warranting the stay.

[14] The defendants contend that the two grounds set out above – the defendants' appeal to the Special Commissioners, and the challenge to the constitutionality of the LHDN's civil suit filed under sub-s. 106(1), which attracts the application of sub-s. 106(3) – constitute the "special circumstances" that justify a stay of this whole civil suit.

[15] Opposing the application for a stay of proceedings, the LHDN cites the authority of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1; [2004] 1 MLJ 257; [2003] 5 AMR 758, to argue that there are no "special circumstances" that warrant a stay of execution here.

[16] But the applicable procedural law principle is not "special circumstances". And the defendants are not asking for a stay of execution, but rather a stay of this civil suit proceeding, pending the outcome of another proceeding, because the other proceeding is related to, or will have a bearing on, this suit.

[17] The principle of law to apply is actually the principle of "rare and compelling circumstances". Where there is an application for a stay of proceedings, pending the outcome of another proceeding, a stay of proceeding will not be granted unless there are "rare and compelling circumstances" that behove the stay of proceedings: *Protasco Bhd v. Tey Por Yee & Another Appeal* [2018] 5 CLJ 299; [2018] MLJU 993 (CA).

[18] In *Protasco* (*supra*), the Court of Appeal, through Her Ladyship Nallini Pathmanathan JCA (as she was then), propounded that when there is an application to stay a proceeding, pending the outcome of another proceeding, the principle to follow is to consider and decide whether there are "rare and compelling circumstances" that necessitate the stay that is sought. The "rare and compelling circumstances" test was formulated by the UK Court of Appeal in *Reichhold Norway ASA & Anor v. Goldman Sachs International* [2000] 1 WLR 173 (UKCA).

[19] This is what Her Ladyship said:

> **The Law Relating To Whether The Court Proceedings By Protasco Against Tey And Ooi Should Be Stayed Pending the Resolution of The Arbitration Between Protasco And PT ASU**
>
> [32] We have considered the authorities submitted by both parties. The law in relation to the issue of staying proceedings against non-parties pending arbitration is not in substance different in the Commonwealth jurisdictions. However, the threshold to be applied in relation to the right of non-parties to proceed with their actions notwithstanding arbitration agreements, does vary.

[33] In the United Kingdom, the threshold that has to be reached to warrant the grant of a stay of proceedings against non-parties pending arbitration, was considered by Lord Bingham of Cornhill CJ in *Reichhold Norway ASA and Another v. Goldman Sachs International* [2000] 2 All ER 679 ('*Reichhold Norway*'). That standard was stated to be:

(a) Invoked in "**rare** and **compelling** circumstances";

(b) There ought to be very strong reasons for granting such a stay;

(c) The benefits likely to result from granting such a stay of proceedings must clearly outweigh any disadvantage to the nonparty.

[34] (See also *Mabey and Johnson v. Danos and Others* [2007] All ER (D) 177, where the English High Court refused a stay against a non-party to the arbitration. There the allegations were fraud and conspiracy which bear a passing resemblance to the instant appeals. There the court highlighted the importance of hearing the "human witnesses in a public forum in relation to the allegations of conspiracy and fraud. Another key factor that influenced the judge was that the non-party seeking the stay appeared to be taking advantage of the stay granted to the arbitrating parties to suggest that he would be unfairly prejudiced. The court rejected this contention. In the course of exercising its discretion the learned judge found that the facts did not fall within the "**rare** and **compelling** circumstances" envisaged in *Reichhold Norway*).

[35] This threshold of "**rare** and **compelling** circumstances" was applied by Komathy Suppiah JC in the case of *Jacob and Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co And Ors* [2013] 1 LNS 914 where it was held that the test to be utilised was not that of "special circumstances" but rather the "**rare** and **compelling** circumstances" test enunciated in *Reichhold Norway*. The learned judge reasoned that it was consistent with a fundamental rule that a plaintiff was not only entitled but required to prosecute his claim in court expeditiously and proceed with trial.

[36] On appeal, this court did not disagree with the test applied by High Court. (emphasis added)

[20] I am mindful that *Protasco* (*supra*) is a matter where the High Court granted a stay of its proceedings, pending the arbitration of another dispute between one of the parties and an extraneous non-party. The Court of Appeal reversed the decision of the High Court – that is, disallowed a stay of the High Court proceedings pending the arbitration – and remitted the matter to the High Court "for trial to be conducted as expeditiously as possible": see para. [96] of *Protasco* (*supra*).

[21] I am also mindful that the High Court case of *Jacob and Toralf Consulting Sdn Bhd & Ors v. Siemens Industry Software GmbH & Co.kg And Ors* [2013] 1 LNS 914, which was referred to in *Protasco* (*supra*), is also a matter where a party applied for a stay of the High Court proceedings pending a Singapore arbitration, where the party who applied for the stay of proceedings is not a party to the arbitration.

[22] Her Ladyship Komathy Suppiah JC (as she was then) did not allow a stay of the High Court proceedings.

[23] Both *Protasco* (*supra*) and *Jacob and Toralf* (*supra*) applied the "rare and compelling circumstances" test, for when there is an application to stay the High Court's proceedings, pending the outcome of an arbitration.

[24] I do not think that the "rare and compelling circumstances" test is limited to the circumstance where the application to stay the proceedings is pending the outcome of an arbitration proceeding only. I am of the view that the "rare and compelling circumstances" is indeed the proper general principle to follow, where there is an application for a stay of proceedings, pending the outcome of another proceeding – be it an arbitration proceeding, or another court proceeding, or as it is here: an appeal proceeding before the Special Commissioners of Income Tax.

Were There Rare And Compelling Circumstances In This Proceeding?

[25] Even though the defendants have appealed to the Special Commissioners on the additional tax assessment, the LHDN has exercised their statutory right to file a civil suit against the defendants to recover the same amount of tax as a debt that is due. This right comes from sub-s. 106(1) of the Act, as set out above.

[26] This civil suit is independent and distinct from the defendants' appeal to the Special Commissioners. When the assessment notice was issued to the defendants, the defendants have a statutory duty to pay the amount of tax assessed. This duty is sustained even if the defendants challenge the assessment by an appeal to the Special Commissioners: *Chong Woo Yit v. Government Of Malaysia* [1989] 2 CLJ 87; [1989] 1 CLJ (Rep) 9; [1989] 1 MLJ 473 (SC).

[27] The Supreme Court in *Chong Woo Jit* (*supra*) through His Lordship Gunn Chit Tuan SCJ, stated at p. 12 (CLJ); p. 475 (MLJ) that:

> … this was simply a claim by the Government for payment of income tax and that it was clear from the decided cases referred to by Gill FJ (as he then was) in *Sun Man Tobacco Company Ltd v. Government of Malaysia* [1973] 2 MLJ 163 that the effect of the relevant provisions of the Income Tax Act 1967 was that **on the service of a notice of assessment** on the person assessed, **the tax payable** under the assessment **becomes due and payable whether or not the person appeals against the assessment,** and could be recovered by the Government by civil proceedings as a debt due to the Government. (emphasis added)

[28] Similarly, the Court of Appeal held that taxpayers must pay the tax that they are assessed to pay, even if they are "dissatisfied" with the assessment. That obligation is a "statutory requirement": *Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2009] 1 MLJ 555 (CA); [2008] 6 CLJ 235.

[29] In *Ta Wu Realty* (*supra*), the Court of Appeal through His Lordship Suriyadi Halim Omar JCA (as he was then) held:

> It has to be clarified that a prompt payment to the Inland Revenue is not an indulgence on the part of a taxpayer but a **statutory requirement.** The law on this point is well established, as once the Director General has made an assessment, and issued a notice of assessment to a taxpayer calling upon him to pay the tax mentioned, **he must pay up that tax liability** within a specific period, **even though dissatisfied with that assessment.** Whether the assessment is right or wrong the tax must be paid **notwithstanding any objection or appeal** (*Comptroller-General of Inland Revenue, Malaysia v. Weng Lok Mining Co Ltd* [1969] 2 MLJ 98).
>
> (emphasis added)

[30] So, there is nothing rare and compelling about the circumstance that the defendants are in. Even though they are appealing against the assessment, the LHDN is entitled to file this civil suit against the defendants to recover the assessed amount as a debt that is payable.

[31] The civil suit proceeding has its own process leading to its determination, quite irrespective of the defendants' appeal to the Special Commissioners.

Is There A Duplicity Of Claims That May Lead To Overpayment?

[32] Then there is the question about whether there is a duplicity of claims, which may lead to an overpayment of tax – since the defendants are appealing against the assessed tax amount to the Special Commissioners, while concurrently, the LHDN is seeking judgment for the same assessed tax amount in this civil suit.

[33] I do not see how there will be an overpayment of tax, because at the end of the day, there is an accounting or a netting-off calculation that has to be done on the tax amount payable (if there is a tax amount payable).

[34] The outcome of this civil suit could be in the defendants' favour, where judgment is not entered against the defendants for the assessed tax amount. Or, the outcome could be in the LHDN's favour, where judgment is entered against the defendants. If judgment is entered, the defendants will have to pay the judgment sum to satisfy the judgment.

[35] Now, about the defendants' appeal to the Special Commissioners – the defendants could fail in their appeal. That means that the assessed tax amount is upheld. The defendants will have to pay the assessed tax amount.

[36] Even if judgment is not entered against them in the civil suit, arguably, the defendants will still have to pay this upheld assessed tax amount, because the Special Commissioners held that the assessment was correct.

[37] If, however, judgment is entered against them in the civil suit, the defendants will indeed have to pay the judgment sum, which is the same amount as the assessed tax amount.

[38] What if the defendants succeed in their appeal to the Special Commissioners? If they succeed in their appeal, the assessed tax amount will be extinguished or reduced. Then as far as payment goes – whatever tax amount that they may have paid to the LHDN that is over-and-above the assessed tax amount, can be refunded as an overpayment: *Kerajaan Malaysia v. Mudek Sdn Bhd* [2017] 10 CLJ 158; [2017] 5 MLJ 133 (FC).

[39] The Federal Court in *Kerajaan Malaysia v. Mudek* (*supra*), through His Lordship Prasad Sandosham Abraham FCJ, held:

> [14] In the upshot:
>
> (i) if a notice of assessment is raised, and if a tax payer wishes to raise issues pertaining to the amount, the correctness or the legality of the assessment raised, the tax payer should invoke s. 18 of the said Act. If this is resolved in the tax payer's favour then **whatever tax paid** can be **refunded as an overpayment** pursuant to s. 24 of the said Act… (emphasis added)

Does The Former Prime Minister's Federal Court Tax Appeal Have A Bearing On This Civil Suit?

[40] As for the defendants' argument that this civil suit proceeding should be stayed, to wait for the outcome of the Mohd Najib bin Abdul Razak's Federal Court tax appeal – I find that the existence of that appeal does not tantamount to a rare and compelling circumstance that warrants a stay of this civil suit proceeding. This civil suit can and should be determined on the current existing law and on current legal principles.

[41] Also, I am of the view that there is a fundamental principle in our procedural law that – recognised exceptions aside – one proceeding should not be held back by another proceeding. Expressing it complementarily, one proceeding should not be allowed to hold back another proceeding.

[42] That is the reason behind principles such as these – there must be "special circumstances" before a stay of execution can be granted; and in our context here, there must be "rare and compelling circumstances" before a stay of present proceedings pending the outcome of another proceeding, can be granted.

[43] This rationale is also in line with the charge contained in O. 34 of the Rules of Court 2012, for the court to "make such order or give such direction as it thinks fit" to "secure the just, expeditious and economical disposal" of matters before the court.

Conclusion

[44] The legal principle to follow in considering an application for a stay of the present proceeding, pending the outcome of another proceeding, is the "rare and compelling circumstances" principle, and not the "special circumstances" principle applicable for a stay of execution of a judgment.

[45] The fact that the defendants have a pending appeal before the Special Commissioners of Income Tax, even though it is for the same amount of tax, is not a rare and compelling circumstance that warrants a stay of this civil suit. The LHDN is statutorily entitled to file this separate civil claim for the tax payable as a debt due to the LHDN.

[46] Similarly, as the outcome of the Mohd Najib bin Abdul Razak Federal Court tax appeal may or may not bear on this civil suit proceeding, that Federal Court tax appeal does not comprise a "rare and compelling circumstance" to justify a stay of this civil suit proceeding. This civil suit can and should be decided on current law and current legal principles.

[47] On these grounds, I dismiss the defendants' application for a stay of this civil suit proceeding, with costs.